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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

REUBEN D. SILLIMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 1–19)[1] is reported at 167 F. 2d 607. The opinion of the District Court for the District of

[1] References to the proceedings on appeal are designated as "R."; to the Appendix printed by the defendant below as "D."; to the Appendix printed by the Government below as "G."; and to the Appendix filed with the Government's petition for rehearing as "G. R." Government exhibits are cited as "G. Ex." and the defendant's as "D. Ex."

New Jersey denying the respondent's motion for dismissal of the complaint and for summary judgment, and granting the petitioner's motion to have certain defenses stricken (D. 117a–136a), is reported at 65 F. Supp. 665.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 25, 1948 (R. 20). A petition for rehearing was denied on April 27, 1948 (R. 37). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The United States, as a judgment creditor of a decedent's estate, participated in a state probate proceeding for the purpose of objecting to allowances of counsel fees to a lawyer on the ground that his services to the estate had been fraudulent. The transcript of proceedings in the probate court shows that the counsel fees in respect of the particular services alleged to be fraudulent were disclaimed and for that reason disallowed. Moreover, the transcript also shows that in allowing fees for the remaining services, there was neither any issue of fraud nor any evidence presented as to fraud. The questions here are:

1. Whether, in a subsequent civil action for fraud against the lawyer in a federal court, the United States is foreclosed from showing fraud

on the ground that the partial allowance of fees by the state court is *res judicata* as to the absence of fraud.

2. Whether the United States risks being foreclosed under the doctrine of collateral estoppel by raising (without litigating) an issue in a state probate proceeding in an incidental connection which it thereafter undertakes to litigate directly in a federal district court.

3. Whether an issue which is raised but not litigated, and which is not determined either expressly or by necessary implication, becomes *res judicata* in a second and wholly distinct proceeding.

STATUTES INVOLVED

The issues raised by the present proceeding are not statutory. The action was brought pursuant to Jud. Code § 24 (1) (28 U. S. C. 41 (1)).

STATEMENT

The United States brought the present action to recover from an attorney sums of which it had been defrauded by reason of a conspiracy between this attorney and his client, now deceased. The jury found for the Government, but the judgment entered on the jury's verdict was reversed by the court below, on the ground that the issue of fraud had become *res judicata* because of certain proceedings in a Surrogate's Court in New York, which concerned the allowance of counsel fees to the attorney for services to his deceased client's

estate, fees which were opposed by the United States as judgment creditor of the estate. The facts out of which the present litigation arose may be summarized as follows:

1. *Background.*—The client in the case, Johann F. Hackfeld, was born in Germany in 1856 (G. 33a). He came to the then independent Kingdom of Hawaii, and, after that country became a Republic, received from it a Certificate of Special Rights of Citizenship, which extended "all the privileges of Citizenship," limited to the period of his domicile in the Republic, but "without thereby prejudicing his native Citizenship or allegiance" (G. 96a–97a). Hackfeld was never naturalized in the courts of the Kingdom, Republic, or Territory of Hawaii.[2] Around 1900, he took his family back to Germany (D. 218a–219a; G. 73a–74a), sold his Honolulu home (*ibid.*), and bought two houses in Germany (G. 89a). During the years 1900 to 1914, he travelled between Germany and Hawaii on business (D. 359a–363a). When World War I broke out, he was in Ger-

[2] The Certificate just mentioned was issued by the Minister of the Interior pursuant to Art. 17, Sec. 2, of the Constitution of the Republic of Hawaii (G. 97a). Naturalization, however, was placed under the exclusive jurisdiction of the Justices of the Supreme Court, and required, *inter alia*, an oath abjuring allegiance to the alien's native land. Haw. Const. 1894, Arts. 18, 101; G. 98a–99a. Hackfeld never took any of the steps which the Hawaiian Constitution made requisite to naturalization, nor was he ever naturalized in any American court after annexation.

many, and he remained there through 1923 (G. Ex. 1, D. 458a). His wife and children never returned to Hawaii (D. 220a).

Hackfeld had prospered in Hawaii, and, in 1918, owned a controlling interest in H. Hackfeld & Co., Ltd., one of the five largest sugar factoring companies in the Islands (D. 459a). After the passage of the Trading with the Enemy Act in October 1917, Hackfeld's Hawaiian property was seized by the Alien Property Custodian (G. Ex. 1, D. 458a). It was subject to seizure because Hackfeld, as a resident of Germany, was an enemy within the Act regardless of nationality.[3] The Custodian reorganized H. Hackfeld & Co., Ltd., sold it as a going concern to a new corporation, and held the proceeds in the names of the former enemy owners (G. Ex. 53, G. 78a–81a).

Enemies of American nationality were enabled to recover their seized property as early as 1920,[4] but no provision was made for returns to enemies of German nationality until 1923; the Winslow Act passed in that year permitted them to receive $10,000 of seized capital, and $10,000 income a year.[5] Hackfeld made no move for the return of his property until 1923, when he retained a lawyer to file a claim under the Winslow Act (D. 171a). Later that summer, he retained an-

[3] Sec. 2 (a) of the Trading with the Enemy Act, 40 Stat. 411 (50 U. S. C. App. 2 (a)).

[4] Act of June 5, 1920, c. 241, 41 Stat. 977.

[5] Act of March 4, 1923, c. 285, 42 Stat. 1511.

other lawyer, the respondent Silliman (G. Ex. 4, G. 31a), and in the fall of 1923 Silliman, on Hackfeld's behalf, filed a claim for the return of all the seized property, representing under oath that Hackfeld was an American citizen domiciled in Hawaii (G. Ex. 3, D. 458a). The Custodian required proof of citizenship and advised Silliman to have Hackfeld obtain a passport (D. 27a). Hackfeld applied for one, alleging that he had become a Hawaiian citizen in 1894 and an American citizen in 1900, that he had always believed himself to be an American citizen, that Honolulu was his home, and that he had never expatriated himself (G. Ex. 6, D. 468a). In due course, on the strength of representations made by Silliman,* and reassured by the report of Vice-Consul Roll, who had taken Hackfeld's affidavit in Bremen and who happened to be visiting

* In order to neutralize the statutory presumption of expatriation created by Hackfeld's long residence in his native land, it was essential to satisfy the authorities that Hackfeld had not intended to expatriate himself or that he had been consistently loyal to the United States. Section 2 of the Act of Mar. 2, 1907, c. 2534, 34 Stat. 1228, 8 U. S. C. (1934 ed.) 17; Sec. 21 of the Trading with the Enemy Act, 42 Stat. 1516, 50 U. S. C. App. 21. Accordingly, Silliman represented to officials of the State Department and the Department of Justice, *inter alia*, that Hackfeld had never held himself out as a German (G. Ex. 8, 9; G. 33a, 46a), that he had strongly supported the early entry of America into the war on the side of the Allies (G. Ex. 3; D. 458a), and that after the American declaration of war he had purchased Liberty Bonds (G. Ex. 8, 9; G. 33a, 46a).

the United States, the State Department issued Hackfeld a passport (D. 294a–304a).

Armed with this passport, Hackfeld came to the United States and obtained the return of his seized property; the allowance was recommended by Attorney General Stone, and, in April 1924, signed by the President (G. Ex. 47, D. 494a). All told, Hackfeld received, between 1924 and 1931, some $3,867,229.86, the greater part thereof in 1924 (D. 119a). Once his status as an American had been recognized, Hackfeld and certain other former stockholders in H. Hackfeld & Co., Ltd., sued the purchasers and reorganizers of that concern, alleging that the Hackfeld firm had been fraudulently sold for less than its true value (G. R. 39a). This litigation terminated unsuccessfully in April 1932, after many years in the courts,[7] and in August 1932 Hackfeld died in Germany (G. 78a). He had never lived in the United States after 1924, except for brief visits, and had never set foot in Hawaii after 1914 (G. 88a–89a).

2. *Litigation by and against the Hackfeld estate.*—Hackfeld having failed during his lifetime to establish that H. Hackfeld & Co., Ltd., was worth more than its sale price in 1918, his ancillary executor in the United States, one Fredrick Rodiek, undertook thereafter to prove the

[7] *Isenberg* v. *Sherman*, 212 Cal. 454, rehearing denied, 212 Cal. 507, motion to recall remittitur denied, 214 Cal. 722, certiorari denied, 286 U. S. 547.

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same thesis. But instead of proceeding against the purchasers, Rodiek undertook to recover the difference between proceeds and alleged true value from the United States. Accordingly, after a private relief bill for his benefit (S. 3227, 73d Cong., 2d sess.; G. 87a) had been referred by the Senate to the Court of Claims (S. Res. 229; G. 87a), Rodiek (represented by Silliman) brought a Congressional Reference in the Court of Claims under Jud. Code § 151 (28 U. S. C. 257). In this proceeding, he alleged Hackfeld's American citizenship and domicile in Hawaii, and sought to recover some $3,000,000 (G. 79a).

After this litigation started, in July 1934, the Government investigated and, after investigation, brought an action against Rodiek as ancillary executor in the District Court for the Southern District of New York, to recover a portion of the payments theretofore made to his decedent (D. 23a, 33a, 119a), alleging that they had been made by reason of fraud, mistake of law, and corruption. The complaint alleged that, as a matter of law, Hackfeld never had been a Hawaiian citizen at any time and consequently never had been an American citizen; that he had fraudulently misrepresented his belief in citizenship and the material facts bearing on his domicile (which latter bore on the question of expatriation); and that he had made a payment of $1,500 to Vice-Consul Roll, the same who had made the favorable report to the State Department which resulted in the

issuance of an American passport to Hackfeld.

The Court of Claims proceeding was stayed to await outcome of the New York action; the latter resulted in a directed verdict for the government, on the ground that, as a matter of law, Hackfeld had never acquired Hawaiian or American citizenship at any time. Judgment was entered in the amount of $1,605,057.32, representing the difference between the amount Hackfeld had received as an American and the largest amount he could have received at any time as a German, together with interest from the respective dates of payment.[8] In view of this disposition of the case, the issues of fraud and corruption were not determined at the trial.

On appeal, the Second Circuit affirmed, still on the legal issue of citizenship and without consideration of the other questions. *United States* v. *Rodiek,* 117 F. 2d 588. A petition for rehearing, asking *inter alia* disallowance of the portions of the judgment representing interest, was denied on the ground that the district judge "did not regard the payments as resulting from an entirely innocent mistake on the part of Hackfeld." *United States* v. *Rodiek,* 120 F. 2d 760, 762. On certiorari, the judgment in favor of the United

[8] After 1928, Germans were entitled to receive 80% of their seized capital. Settlement of War Claims Act of March 10, 1928, c. 167, 45 Stat. 254. After 1934, however, all further payments were cut off, because of German defaults. Jt. Res. of June 27, 1934, c. 851, 48 Stat. 1267.

States was affirmed by an equally divided court. 315 U. S. 783 (No. 325, Oct. T. 1941).

Thereafter the Court of Claims resumed consideration of the Congressional Reference. It found facts amounting to fraud, found as a fact that Hackfeld had paid $1,500 to Vice-Consul Roll, and concluded that the Hackfeld estate had no legal or equitable claim against the United States. *Rodiek* v. *United States,* 100 C. Cls. 267.

3. *The Present Proceeding.*—The Hackfeld estate in the United States was insufficient to satisfy the judgment obtained by the Government in the New York proceeding. It was clear from the lengthy record in that case that Hackfeld had never represented himself as being an American citizen prior to retaining the respondent Silliman as counsel. Accordingly, the United States brought the present tort action, alleging that the respondent had induced the allowance of Hackfeld's claim by false and fraudulent representations as to the latter's citizenship, domicile, and loyalty (D. 14a–16a), specifically that, knowing Hackfeld to be a German and an ineligible claimant, the respondent had filed a claim representing Hackfeld to be a loyal American, domiciled in Hawaii, and eligible for a return of all his seized property; that the respondent Silliman had conspired with Hackfeld to defraud the United States; and that he, the respondent Silliman, had likewise made a payment to Vice Consul Roll, this one in the amount of only $500 (D. 18a). The

ad damnum sought was the amount of the unsatisfied balance of the judgment against Hackfeld's estate, with interest (D. 24a).

A motion to dismiss the complaint and for summary judgment was denied by the District Court in a careful opinion (*United States* v. *Silliman*, 65 F. Supp. 665 (D. N. J.); D. 117a–145a), and, after a jury trial, judgment was rendered for the Government on a verdict in its favor, in the amount of $1,106,031.45, the sum prayed for with interest to the day before the verdict (D. 10a, 455a). On appeal, the court below reversed (R. 1–20). It proceeded on the ground that the issue of fraud between the United States and the respondent Silliman had been litigated and determined before the Surrogate of New York County, in a proceeding for the allowance of Silliman's counsel fees from the Hackfeld estate where the United States filed objections as judgment creditor. It held, therefore, that the issue of fraud had become *res judicata*. A petition for rehearing (R. 21–36) which pointed out that this issue had been neither litigated nor determined before the Surrogate was denied (R. 27). The ground taken by the court below makes necessary a detailed statement regarding—

4. *The Proceedings in the Surrogate's Court.*—After the entry of the judgment in favor of the Government in the Southern District of New York, the respondent Silliman filed a claim in the Surrogate's Court, New York County, which

was administering Hackfeld's ancillary estate, for counsel fees in respect of services rendered the estate from the time of Hackfeld's death in 1932 until 1943. The United States objected to the allowance of further fees to Silliman, and sought a surcharge as to fees previously allowed on the ground that he had committed fraud (D. 39a–42a). The allegations of fraud related, first, to the filing of Hackfeld's original alien property claim in 1923–1924; those services, occurring during Hackfeld's lifetime, were of course not services to the estate and were relevant only as reflecting the origin and nature of the fraud which, it was alleged, tainted respondent's services in the Court of Claims proceeding. The allegations as to fraud relating to the latter services were made on the footing that respondent had already received fees from the estate for such services, and was seeking further fees for services in the same proceeding (G. R. 38a).

At the hearing before the Surrogate, on December 8, 1943, the respondent testified that up to that time he had received no fees in respect of the Court of Claims proceeding, and that he was not seeking further compensation for any services rendered in that connection (G. R. 5a–6a, 14a). Thereupon the Surrogate eliminated from consideration any services rendered by respondent in the Court of Claims matter, and allowed no fees for such services (G. R. 18a). These were the only services rendered to the estate which the Gov-

ernment alleged to be fraudulent, and, as the stenographic minutes set forth below show, the Government ceased to press its objections based on fraud once the Surrogate eliminated the Court of Claims services from consideration.

Early in the hearing the Surrogate showed his interest in the question whether fees in connection with the Court of Claims matter had been paid or were sought.

> The SURROGATE. Will you make a general statement of the nature of that action?
>
> The WITNESS [Mr. Silliman]. Of the Court of Claims proceeding?
>
> The SURROGATE. Yes. In the first item we have therein an attack upon your whole handling of the litigation and the payment of any moneys in connection with it. In the first place, were you paid anything for services in connection with that action?
>
> The WITNESS. No, sir. [G. R. 5a–6a.]

In one form or another, this inquiry was repeated again and again (G. R. 6a–7a, 10a–11a, 12a, 14a, 18a, 19a). At one point the Surrogate admonished Government counsel that the Court of Claims fees were definitely not in issue (G. R. 12a).

> The SURROGATE. I cannot follow your suggestion at all here. *This man has taken out of every consideration from me any allowance for services rendered in the Court of Claims.* I am certainly not going to allow him a penny for that on that statement.

If you point out any item in his affidavit of services for which he charges a fee, I will be very glad to disallow it or disregard it. I never heard of an argument where an attorney says, "I do not want any money," to say I must force it on him or do what? [Italics added.]

Government counsel reverted to the point, however, and finally the Surrogate expressed himself rather forcefully on what he conceived to be at issue (G. R. 12a–13a).

Mr. JONES [Counsel for the United States]. Our contention is that this $10,000 payment made to Mr. Silliman was for services in prosecuting the Court of Claims case here, and he admits it.

The WITNESS [Mr. Silliman]. I do not admit it at all.

The SURROGATE. He denies it. Apparently he is going to deny it, from what his son says.

The WITNESS. I simply said there were payments made he knew all about.

The SURROGATE. Taking the other side of your case, Mr. Jones, this man *having withdrawn any claim or renounced any claim for the Court of Claims litigation, then it becomes a question as to what he was reasonably entitled to for other matters in the estate. Why should we litter up this record with all these statements?* Do you think the Surrogate is not keen enough to differentiate between services rendered on

a contingent agreement and the reasonable value of services rendered? [Italics added.]

Mr. JONES. Not at all. Those services were rendered in the Court of Claims case, a fraudulent proceeding, in which he should not be paid.

The SURROGATE. He wants no part of these fees for these services.

Mr. JONES. I am not directing it to the present fees, but the fees already paid.

The SURROGATE. They were fixed by Surrogate Delehanty, a payment on account only, and he is asking for an over-all fee here and the awarding of the balance of $15,000.

The WITNESS. Yes, $15,000, what I ask on account of services, and $1,600 on account of disbursements that have never been paid.

Mr. JONES. I do not know whether it is necessary in this court to offer in evidence the pages as part of the court record or not, but if you will examine those various pages——

The SURROGATE. I am not examining them. *I am here to try a case, not to read a lot of immaterial matters.* I am going to hold you down to your proof strictly within the rules of our court. *I do not care to go into the New Jersey litigation*[9] *unless there is an attempt here on his part to charge a fee for that litigation.* * * * [Italics added.]

[9] The present proceeding.

Again when certain disbursements were under consideration the Government counsel objected only because he thought they were in connection with the Court of Claims. The Surrogate reassured him on the question (G. R. 19a):

> The SURROGATE. Have you any specific objection to these disbursements?
>
> Mr. JONES. Only our general objection that they are not in connection with—the major one in connection with the Court of Claims, and, therefore, they are not allowable.
>
> The SURROGATE. Do any of these items of disbursements within the $1892.85——
>
> The WITNESS. No.
>
> The SURROGATE.—relate to the Court of Claims?
>
> The WITNESS. No; all for the District Court, the Circuit Court and the United States Supreme Court.
>
> The SURROGATE. Does that assure you, Mr. Jones?
>
> Mr. JONES. I beg your pardon.
>
> The SURROGATE. He says the $1,892.85 were not in any way connected with the Court of Claims litigation.
>
> Mr. JONES. We have no assurance that they were not.

At the end of the hearing the Surrogate reserved decision upon but one question, the reasonable value of Silliman's services. He had not passed on the truth of the allegations of fraud be-

fore that time, and he failed to reserve the point (G. R. 35a).

In an opinion filed the day after the hearing, the Surrogate overruled all objections, excluded from consideration Silliman's services in the Court of Claims matter, and fixed the reasonable value of the services of Silliman to the estate (D. 43a). The opinion made no mention of fraud. Thereafter a proposed decree was submitted by the respondent as counsel for Hackfeld's executor, a counter decree was submitted by the United States, and memoranda in support of both decrees were filed. The decree submitted by the executor was open to the interpretation that the factual issue of fraud had been litigated before the Surrogate, and the United States objected to the decree on that ground. Although the Surrogate did not grant the United States all the clarification sought, he deleted the following from the decree proposed by the respondent:

> and the objectant, the United States of America, having failed to establish the allegations and charges by it in said remaining objections.

Moreover, he added the following paragraph (D. 75a):

> Ordered, Adjudged and Decreed that the Surrogate has excluded from consideration any compensation for services which were rendered in the United States Court of Claims because of the fact that they

> were covered by a separate agreement between the attorney and the ancillary executor for compensation on a contingent basis * * *

The decree as finally entered does not therefore disclose on its face whether or not the Surrogate considered the truth of the allegations of fraud; it shows only that he overruled the objections based upon them (D. 77a).

When respondent's defense in the present proceeding, that the decree of the Surrogate was equivalent to a finding (having the effect of *res judicata*) that respondent had not been guilty of fraud, was stricken out, the District Court did not expressly decide whether the Surrogate had in fact passed on the existence of fraud; it only held that, even if a determination as to fraud had been made, such determination could not work an estoppel by judgment. *United States* v. *Silliman, supra,* 65 F. Supp. at 669–670; D. 121a–124a.

The court below, however, on the basis of the pleadings before the Surrogate's Court without more, held that the issue of fraud was decided by that tribunal, and proceeded to hold that this "determination" was binding in the instant action (R. 12–19). A petition for rehearing, to which was attached the transcript of the Surrogate's proceedings (G. R. 1a–35a) to show what was actually decided there, was summarily denied without opinion (R. 37).

SPECIFICATIONS OF ERROR TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Surrogate's Court had passed on the issue of whether the respondent had committed fraud in connection with the presentation and allowance of the Hackfeld claim in 1923–1924.

2. In holding that the proceedings in the Surrogate's Court made the question whether respondent had committed fraud in connection with the presentation and allowance of the Hackfeld claim in 1923–1924 *res judicata* in the present action.

3. In holding that the decree in the Surrogate's Court made the question whether respondent had committed fraud in connection with the presentation and allowance of the Hackfeld claim in 1923–1924 *res judicata* in the present action.

4. In reversing the judgment of the district court.

REASONS FOR GRANTING THE WRIT

The decision below is in conflict with a long line of applicable decisions of this Court, only recently reaffirmed, as to the proper and narrow scope of the doctrine of collateral estoppel; it is in conflict with a decision in the Second Circuit dealing with a similar question concerning this identical controversy; and it imperils the position of the United States whenever, as in the course of the protracted Hackfeld litigation, it

is required to assert rights and protect assets in State courts.

1. The holding of the Circuit Court of Appeals that the issue of the truth of the allegations of fraud is *res judicata* by reason of the ambiguous decree of the Surrogate is in plain conflict with the hitherto well-settled rule that a judgment in a prior suit involving a different cause of action can operate as an estoppel only as to "the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined." *Cromwell* v. *County of Sac,* 94 U. S. 351, 353. Or, as stated in *Russell* v. *Place,* 94 U. S. 606, 608–610:

> * * * to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined,—that is, that the verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment *necessarily involved* the consideration and determination of the matter.
>
> * * * * *
>
> According to Coke, an estoppel must "be certain to every intent;" and if upon the face of a record any thing is *left to conjecture as to what was necessarily involved and decided,* there is no estoppel in it when pleaded. [Italics added.]

See also *Hopkins* v. *Lee,* 6 Wheat. 109, 114; *Mercoid Corp.* v. *Mid-Continent Co.,* 320 U. S. 661.

This unbroken line of precedent, wholly disregarded by the decision below, was only recently reiterated by this Court in a decision announced after the opinion below but cited to the Circuit Court of Appeals in the petition for rehearing (R. 24, 27, 34–35). *Commissioner* v. *Sunnen*, 333 U. S. 591.

On the authority of the above cases, the decree of the Surrogate with respect to counsel fees could foreclose litigation of the factual issue of fraud in a tort action only if the Surrogate necessarily and actually determined that issue. Evidently, the Court of Appeals thought that it was meeting this test when it concluded that "the Surrogate decided the issues directly raised 'in the pleadings' by the objections filed by the Government" (R. 14). But all that the Surrogate actually decided was that certain objections to the allowance of fees should not prevail. And it is clear, both from the relevant New York law and from the record in the New York proceedings, that the existence or nonexistence of fraud was not determined by the Surrogate, and was never intended by him to be determined.

A. It was not necessary for the Surrogate to pass on the truth of the Government's allegations of fraud because those allegations became immaterial—and were therefore properly overruled—as soon as the services in the Court of Claims were eliminated from consideration. When those services were put out of the case, the only services for which the Surrogate was asked

to allow fees were services which were not alleged to be fraudulent. The Government's allegations of fraud could have been material to the issue of awarding fees for such nonfraudulent services on one hypothesis only, viz., that a lawyer who has practiced fraud in one phase of his relations with a client is not entitled to the aid of the courts in collecting fees for other and nonfraudulent services. But that hypothesis is not the law of New York. See *Currie* v. *Cowles,* 6 Bosworth 452 (N. Y. Super. Ct.), rejecting "a rule that would make professional infidelity in one suit work a forfeiture of the right to compensation for meritorious services honorably performed in another."[10] Cf. *Smith* v. *Hoctor,* 51 Misc. 649.

[10] Currie, a client, sued Cowles, his lawyer, to recover damages for fraud. The defendant counterclaimed for the value of other legal services. The referee ruled that Cowles, by fraud in respect to one transaction, had forfeited his right to be compensated for any of his services. The court held otherwise, saying (6 Bosw. at 460):

"On what principle he [Cowles] has forfeited his right to compensation for any of his services except those in relation to [the fraudulent transaction] * * * or except in relation to the matters and proceedings in which he had violated, or in bad faith had failed to perform his professional duty, was not suggested to us * * *.

"The Referee * * * could not justly, upon any recognized rule of equity, disallow a just compensation for services rendered in suits and proceedings disconnected from [the fraudulent acts] * * *."

The same rule prevails in other states. E. g., *Rippey* v. *Wilson,* 280 Mich. 233, 245–246, 273 N. W. 552, 556 (collecting authorities from other jurisdictions). See 2 Thornton, *Attorneys at Law* (1914) Sec. 556.

Accordingly, unless the record of the proceedings before the Surrogate clearly and unmistakably shows that he did determine the nonexistence of fraud, an inference that he made this determination, based simply upon the overruling of the objections to certain fees, is worse than merely conjectural (cf. *Russell* v. *Place, supra*); it rests upon an erroneous conception of New York law.

B. The record of the proceedings before the Surrogate, set out above, pp. 11–18, clearly shows that he did not determine the existence or nonexistence of fraud, but, to the contrary, steadfastly refused to pass on the question. On any other basis, it would be difficult to understand why he deleted from the proposed decree the express declaration that the United States had failed to establish its allegations. The changes in the proposed decree, *supra*, pp. 17–18, read in the light of the course of events at the hearing, point to only one conclusion: far from having necessarily and actually passed on the existence of fraud, the Surrogate thought that fraud was relevant only as bearing on services with respect to the Court of Claims action. Consequently, fees for those services having been ruled out, the objections based on fraud were overruled without consideration on the merits.

2. The decision of the court below is in basic conflict with a decision of the Second Circuit involving the same controversy.

When the judgment entered in the federal district court for Southern New York against the Hackfeld estate was being appealed, Rodiek, the ancillary executor, represented by the respondent Silliman, contended that that judgment was erroneous because, *inter alia*, there had been a finding in a prior tax proceeding that Hackfeld was an American citizen. *Rodiek* v. *Commissioner*, 33 B. T. A. 1020, affirmed *sub nom. Rodiek* v. *Helvering*, 87 F. 2d 328 (C. C. A. 2). The Second Circuit held, however, that in the tax proceeding Hackfeld's citizenship had not been a material issue, so that even if the Commissioner's admission there, that Hackfeld was an American, was treated as unqualified, it would still not be *res judicata*. Accordingly, the court went on to consider Hackfeld's citizenship as reflected by the record then under review. *United States* v. *Rodiek*, 117 F. 2d 588, 593.

In the present case, as we have shown, the allegations of fraud in the Surrogate's Court, once the respondent Silliman disclaimed fees for his Court of Claims services, became completely immaterial. They were not asserted as objections to the other fees claimed. Even if we assume *arguendo*, in the face of the overwhelming indications to the contrary in the record, that the Surrogate *did* purport to determine that the allegations of fraud were untrue, any such determination was unnecessary and incidental to the decision of the case before him. Yet the court below

held that the Surrogate's decree allowing those other fees was *res judicata* on the issue of fraud when that issue was raised by the United States directly against Silliman in the present proceeding. In so doing the Third Circuit has done precisely what the Second Circuit properly refused to do; it has given controlling effect to an incidental determination of a matter not necessary to the decision in the first action. Thus there exists a square conflict between circuits arising out of what is in essence the same controversy, namely, the effort of the Government to be made whole for the fraud practiced on it by Hackfeld and Silliman.

3. The decision of the court below makes unduly hazardous the entry of the Government into collateral litigation to assert interests which can be protected in no other way.

Collateral estoppel, like the general doctrine of *res judicata* of which it is an aspect, prevents the parties from establishing the truth. The desirability of putting an end to litigation must be balanced, in both instances, against what the court below describes as the "even firmer established policy of giving every litigant a full and fair day in court" (R. 9). *Res judicata* rests upon "considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations." *Commissioner* v. *Sunnen*, 333 U. S. 591, 597. When a cause of action has received full consideration in a suit based

upon it, that cause is normally *res judicata* for all purposes regardless of the correctness of the decision; the loser has had his day in court. But collateral estoppel is applied "much more narrowly." *Commissioner* v. *Sunnen, supra,* at 598. The reasons are evident. An issue presented in one case may receive neither the emphasis nor the attention which it deserves in another. The first case may not be of sufficient importance to warrant full litigation of the issue, while the second may be of the greatest importance. The issue itself may be of minor significance in the first case, and yet crucial in the second. The forum in the first case may be of a character different from that appropriate for the second. The record in the prior suit must therefore be narrowly scrutinized to ensure that the issue sought to be foreclosed was actually and necessarily determined; nothing may be left to conjecture. As Judge Learned Hand said in *The Evergreens* v. *Nunan,* 141 F. 2d 927, 929 (C. C. A. 2):

> It is, as we have said, a condition upon the conclusive establishing of any fact that its decision should have been necessary to the result in the first suit. That is a protection, for it means that the issue will be really disputed and that the loser will have put out his best efforts. * * * Indeed, it often works very harshly inexorably to make a fact decided in the first suit conclusively establish even a fact "ultimate"

> in the second. The stake in the first suit may have been too small to justify great trouble and expense in its prosecution or defense; and the chance that a fact decided in it, even though necessary to its result, may later become important between the parties may have been extremely remote. It is altogether right that the judgment shall forever put an end to the first cause of action; but it is not plain that it is always fair that every fact * * * decided in it, shall be conclusively established between the parties in all future suits, just because the decision was necessary to the result.

As a judgment creditor of Hackfeld, the United States had no choice but to enter the state court in which his estate was being administered. See *Markham* v. *Allen,* 326 U. S. 490, 494–495. It was obviously in the Government's interest to preserve that insolvent estate by resisting payment therefrom of counsel fees to one whose services were believed to be fraudulent. But when the services as to which fraud had been charged were excluded from consideration, the allegations of fraud became irrelevant and were so treated by the Surrogate. The issue was thus not "really disputed," and the loser had no occasion to put out its "best efforts." *The Evergreens* v. *Nunan, supra.* Indeed, the Government made no further effort to litigate the excluded questions. But the Circuit Court of Appeals has now construed this action of a state Surrogate on a matter at most incidental

to the case before him (cf. *Restatement, Judgments,* Sec. 71), and in fact treated by him as irrelevant, in a manner which would nullify the verdict of a federal jury, reached after a full trial on the merits.

We do not seek to undermine the important principle that matters once litigated should not be endlessly relitigated. What is here involved is a decision which, in effect, precludes a vital issue from being litigated at all. If the doctrine of collateral estoppel is not to cause a greater evil than the one it is intended to cure, it must be strictly confined within the boundaries laid down by this Court. These boundaries are of the greatest importance to any litigant whose interests must be defended in many jurisdictions and in many proceedings; and they are of particular gravity to the United States. For example, in the administration of alien property, the field in which this litigation arises, the United States succeeds to ownership of interests formerly owned by enemies. In the husbanding of these interests with a minimum of dislocation of local legal procedures, the United States is recurrently required to submit some aspects of its rights to determination by state courts. In other instances, the United States must similarly resort to courts of bankruptcy for the conservation of assets to which it is legally or equitably entitled. Unless the proper limits of collateral estoppel are scrupulously observed, the United States is especially

vulnerable to the risk that, as under the decision of the Circuit Court of Appeals in this case, a collateral proceeding of seemingly limited significance will foreclose a subsequent assertion of rights of far greater importance. If the range of uncertainty is to remain as broad as the decision below makes it, the United States may be compelled to forego the assertion of some of the collateral aspects of its rights, and permit the frittering away of estates of which it is the most significant creditor, in order not to place its more important interests in jeopardy.

By its misapplication of the principles of collateral estoppel, the court below has barred recovery against one found by a jury to have defrauded the United States, although the merits of the charge of fraud had never been decided by any other tribunal, and has thus precluded the United States from coming to grips with the real author of the fraud perpetrated upon it. Such a result, in our view is not in accordance with law, and the mischief which the present holding engenders in a broad field of litigation makes clear the necessity for review by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

JULY 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948

IN THE

Supreme Court of the United States

October Term—1948

No. 174

UNITED STATES OF AMERICA,

Petitioner,

—vs.—

REUBEN D. SILLIMAN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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Opinions Below

The opinion (R. 1-19) of the Circuit Court of Appeals for the Third Circuit (hereinafter referred to as "the Third Circuit") is reported at 167 F. 2d 607 (1948). The opinion of the District Court for the District of New Jersey (Meaney, *D.J.*) denying the Respondent's motion for dismissal of the complaint and for summary judgment, and granting the Petitioner's motion to have certain defenses stricken (D. 117a-136a) is reported at 65 Fed. Supp. 665 (1946).

Questions Presented

Questions Presented by the Petitioner

The basic question presented by the Petitioner is whether the Final Decree of the Surrogate's Court, New York County, of the State of New York, in the Matter of the Judicial Settlement of the Account of Rodiek as Ancillary Executor of the Hackfeld Estate (D. 63a) constitutes *res judicata* in the instant case. In the Surrogate's Court proceeding, the Surrogate overruled objections of the Petitioner to the payment to the Respondent of fees for his services to the Hackfeld Estate, determining adversely to the Petitioner its charges of fraud, etc., which are identical with the charges made in this case.

The Petitioner had charged in its objections, in its attempt to obtain a money judgment by surcharging Respondent, that the Respondent had conspired with Hackfeld with the result that Hackfeld had received a greater portion of the proceeds of his property, which had been seized by the Alien Property Custodian, than Hackfeld was entitled to obtain. The present action is based on the very allegations which were overruled by the Surrogate when he adjudged the controversy in favor of the Respondent.

The Third Circuit held that the Final Decree of the Surrogate's Court constituted *res judicata* herein and ordered judgment for the Respondent (Opinion R. 8-17).

Additional Ground in Support of the Decision of the Third Circuit

The Third Circuit, as an additional ground for its judgment, held that the "full faith and credit" clause of the Constitution of the United States and Section 905 (28 USC 687) of the Revised Statutes compelled the District Court

to give the same faith and credit to the Final Decree of the Surrogate's Court as the Courts of New York would give it under New York law (R. 17-19). The Third Circuit further held that under New York law the determination of the non-existence of the alleged wrong by the Surrogate's Court in its Final Decree (R. 18) would be of conclusive effect in any other law suit in the Surrogate's Court or in any other court in the State of New York on the issue.

Other questions of importance were left undecided because the Third Circuit held that the *res judicata* decision was the end of the controversy

Having decided the case on the two above stated grounds, the Third Circuit held it unnecessary to pass on a number of other questions that it referred to in its opinion, saying, of one of them:

> "One very important, and none too easy point, is whether the proof offered at this trial is sufficient to sustain the finding of the jury in favor of the plaintiff and the judgment entered thereon" (R. 19).

Statutes Involved

United States Constitution, Art. IV, Sec. 1, Rev. Stat. Sec. 905, 28 USC 687.

New York Constitution, Art. 6, Chap. 13.

New York Surrogate's Court Act, Sec. 282, Laws of N. Y. 1920, Chap. 928 as amended, L. 1931 Chap. 707, L. 1941 Chap. 129.

Surrogate's Court Act, Sec. 40, L. 1920 Chap. 928.

Surrogate's Court Act, Sec. 80, L. 1920 Chap. 928 as amended, L. 1938 Chap. 157.

Surrogate's Court Act, Sec. 288, L. 1920 Chap. 928 as amended, L. 1931 Chap. 707, L. 1941 Chap. 129.

Statement of the Case

The statement of facts in the Petition for Certiorari is distorted, biased and incomplete, and, in view of the Respondent, largely irrelevant to the consideration of the matter before this Court.

Petitioner is seeking to recover, as damages under the Settlement of the War Claims Act of March 10, 1928, 45 Stat. 254, on the theory that Hackfeld was a German and not an American citizen, a principal sum of $910,376, or 20% of the amount returned to Hackfeld, plus interest at 6% from the date of receipt of payments (D. 20a).

The defendant is a lawyer of more than 50 years standing admitted to practice in this Court in 1902. It is alleged that he and Hackfeld sought to defraud the United States by claiming that Hackfeld was an American citizen in 1923 and 1924. It is the very charge made in the Surrogate's Court which was there determined against the Government.

At the conclusion of plaintiff's case in the District Court the Government counsel admitted that there had been no misrepresentation with respect to Hackfeld having become an American citizen by virtue of his Hawaiian certificate of December 21, 1894 and Section 4 of the Hawaiian Territorial Organic Act of April 30, 1900, 31 Stat. 141, 48 USC Sec. 678 (D. 390a-391a), which was the basis of Hackfeld's Alien Property Custodian Claim of 1923-1924 (D. 391a).

Proceeding in Surrogate's Court of New York

After this Court, equally divided (three of the justices, having been Attorneys General, disqualified themselves), affirmed without opinion (315 U. S. 783, 1941) the judgment of the District Court for the Southern District of New York against Rodiek as Hackfeld's executor, the Government's attorneys took the position in the Surrogate's Court that the entire fund in the hands of Rodiek as such Executor should be paid over to the Government as an equitable owner, and that the application of Rodiek for authority to pay reasonable expenses of administration should be denied.

Surrogate Foley held that the New York District Court judgment was for the recovery of money only and carried no determination of a lien upon the funds of the Hackfeld Estate, *Matter of Hackfeld,* 180 Misc. 406, and having permitted the Government to file objections to all claims of lawyers for compensation for services, and respondent having asked for additional fees for his services since the last preceding payment had been made (D. 73a), objections were filed by the Government to the payment of any additional compensation to Respondent, and it sought to surcharge the Respondent with $66,904.41 previously paid him, alleging fraud and conspiracy between him and Hackfeld. Specifically, in Objection III, the Government objected generally to all disbursements and payments of fees to the Respondent and requested a surcharge against him for the said $66,904.41, which he had previously received on orders of the Surrogate (D. 39a), on the same grounds alleged here.

At the trial of the objections, Respondent stated to the Surrogate that he had not charged any fees for services in connection with the Court of Claims proceeding. The Surrogate thereupon ruled, as stated by the Third Circuit:

"The Government withdrew Objection V and desisted in pressing II when it was informed that the fee allowance had nothing to do with the Court of Claims matter. But it continued to press Objection III" (Note 36, Opinion, R. 12).

The alleged "Excerpts" from the Surrogate's Court's minutes, set out in the Government's Appendix to its Petition for Rehearing in the Third Circuit had to do with Objection II. But the Government did not withdraw Objection III, at the trial in the Surrogate's Court, but sought to have the Surrogate rule on it (G. R. 2a).

The Government's Objection III reads in part:

"III. Objects generally to all disbursements and payments of fees to Reuben D. Silliman and requests a surcharge against him of all sums heretofore received by him from the estate upon the ground (asserted upon information and belief) that he, as attorney for the decedent, Johann Friedrich Hackfeld, personally participated in the filing and prosecution of the false and fraudulent claim against the United States in 1923 and 1924 with full knowledge of its falsity; that said Reuben D. Silliman brought about the illegal and erroneous transfer and payment to the decedent largely by causing the payment by the decedent of money to a vice consul of the United States charged with making recommendations to the Secretary of State on the decedent's citizenship, and by personally bribing said vice consul who reported favorably on an application of the decedent for an American passport which was obtained as a means of inducing favorable consideration by officials of the United States of the decedent's notice of claim as an American citizen under section 9 of the Trading

With the Enemy Act; that said Reuben D. Silliman was and is primarily responsible for the prosecution of the proceeding in the United States Court of Claims referred to in paragraph II, *supra*, and that he accepted payment of all of said fees and disbursements with knowledge of the insubstantial, speculative and fraudulent nature of the claim asserted against the United States in the Court of Claims. * * * "

(Set out in full as a footnote in opinion, R. 12.)

Counsel for the Government, in response to a question of the Surrogate, at the opening of the trial, stated that the Government was "urging Objection III (D. 108a-109a) but the Government failed to produce sufficient proof to establish the objection. The Surrogate had before him at the hearing two volumes of the trial record in *United States* v. *Rodiek*, 117 Fed. 2nd 588 tried in the District Court for the Southern District of New York, which contained evidence relating to the issues of fraud and conspiracy, an affidavit of respondent, sworn to before the Surrogate at trial, under the practice of the Surrogate's Court and Respondent was cross examined by Government Counsel.

The Final Decree of the Surrogate, in overruling the objection, recites and determines the issue as follows:

"Having objected generally to all disbursements and payments of fees to Reuben D. Silliman and requested a surcharge against him for all sums heretofore received by him from the estate upon the ground (alleged upon alleged information and belief) that said Reuben D. Silliman, as attorney for the decedent herein, had personally participated in the filing and prosecution of the alleged false and fraudulent claim against the United States for the return of Hackfeld's property in

1923 and 1924, with alleged knowledge of its alleged faslity, and had brought about the alleged illegal and erroneous transfer and payment to the decedent by the United States of America, by allegedly causing the decedent to pay money to a Vice Consul of the United States of America and (as alleged) personally paying money to said Vice Consul and (as alleged) that said Reuben D. Silliman should have ceased serving as attorney for the Ancillary Executor at the time when (as it is alleged) the United States produced evidence showing that Reuben D. Silliman had been party to the alleged payment of money to the American Consular Officer (General Objection 'III'); * * * (D. 69a-70a)

"The United States of America having specifically prayed in its aforesaid objections that said Reuben D. Silliman be required, pursuant to the provisions of Section 231-A of the Surrogate's Court Act, to refund to the estate the sum of $66,904.41 representing legal fees and expenses theretofore paid to him and such other sums paid to him by the Ancillary Executor for fees or expenses as the Court might find to be neither reasonable, necessary or proper, * * * (D. 71a)

"The proceedings having duly come on to be heard (D. 72a) * * *

"* * * and the issues raised by the remaining Objections having been fully heard and tried by the Surrogate; and

"The Surrogate having rendered and filed his decision herein dated the 9th day of December, 1943;

"Now, upon all the proceedings heretofore and here and due deliberation having been had (D. 75a) * * *

"It further appearing to my satisfaction that Reuben D. Silliman, as attorney for Frederick Rodiek, The Ancillary Executor herein, has rendered services for and in behalf of said Ancillary Executor and the estate herein for a period of approximately eleven years, which included the participation in complicated litigation in the courts of the United States, and that such services benefited the estate and were and are of the fair and reasonable value of the sum of $58,500, and that the Ancillary Executor has paid to said Reuben D. Silliman $48,500 on account of said services, and that Reuben D. Silliman has personally disbursed moneys in behalf of the estate herein during the period from November 5th, 1938, to June 1st, 1942, and that a balance of $1,892.85 remains unrepaid to him therefor, it is further

"ORDERED, ADJUDGED AND DECREED that the balance of compensation due to said Reuben D. Silliman for all services rendered by him as attorney for the Ancillary Executor herein down to the date of this decree, be and the same hereby is fixed and allowed in the sum of $10,000., which sum is presently due and owing to him from the estate for services rendered, and further that Reuben D. Silliman be and he hereby is allowed the balance of his disbursements in behalf of said Estate in the said sum of $1,892.85; and it is further

"ORDERED, ADJUDGED AND DECREED that all objections of the United States of America, the objectant herein, to the payment of attorney's fees and disbursements to Reuben D. Silliman and the request of the United State of America that said Reuben D. Silliman restore to the estate all moneys heretofore paid to him from the estate as and for attorney's fees and disburse-

ments, as prayed for in its written objections and as asserted upon the trial of the issues herein, be and the same hereby are in all respects overruled and denied; * * * " (D. 76a-77a).

An affidavit of James F. Donnelly, filed in the District Court on the motion to dismiss the complaint (R. 95a-112a), sets forth in detail the pertinent occurrences in the proceedings before the Surrogate's Court which resulted in the Final Decree of that Court and shows that the matter is *res judicata*, of the controverted issue, under New York law.

The Government took no appeal (D. 59a-60a). Pursuant to the terms of the Final Decree, the Government received more than $1,000,000 (G. 1).

The Statute conferring jurisdiction on the Surrogate's Court of New York County may be found in the Surrogate's Court Act. It is contained in *Clevenger's Practice Manual* and is also quoted by the Third Circuit in its opinion (footnote 43, R. 15).

Section 40 of said Act reads:

"*General jurisdiction of surrogate's court.*

"Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows:

"To administer justice in all matters relating to the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any proceeding, or between any party and any other person having any claim or interest therein who voluntarily

appears in such proceeding, or is brought in by supplemental citation, as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires. • • • "

Surrogate's Court Act, L. 1920, Ch. 928, quoted in note 43, opinion of Third Circuit (R. 15).

While Section 80 reads:

"*Force and effect of a decree of surrogate's court.*

"Every decree of a surrogate's court is conclusive as to all matters embraced therein against every person of whom jurisdiction was obtained. To such decree there is attached all the presumptions pertaining to a judgment rendered by a court of general jurisdiction in a common law action."

Surrogate's Court Act, L. 1920, Ch. 928 as amended L. 1938, Ch. 157, also quoted (R. 16).

The decisions of the New York courts, construing the Act, establish the full scope and conclusive effect of a New York Surrogate's Court decree. Of these we cite the following:

Matter of Trowbridge, 266 N. Y. 283, 288, 194 N. E. 756;

Matter of Raymond v. *Davis*, 248 N. Y. 67, 71-72, 161 N. E. 421;

In Re Deutsche Estate, 186 Misc. 446, 56 N. Y. Supp. (2d) 768;

Matter of Morris, 134 Misc. 374, 235 N. Y. Supp. 461;

Matter of Emmerich, 175 Misc. 228, 23 N. Y. Supp. (2d) 42;
Matter of Rogers, 168 Misc. 633, 641, 6 N. Y. Supp. (2d) 255;
Matter of Halsted's Estate, 172 Misc. 632, 15 N. Y. Supp. (2d) 862;
Matter of Smith, 259 App. Div. 63, 67, 18 N. Y. Supp. (2d) 381;
Matter of Bird, 166 Misc. 786, 790, 2 N. Y. Supp. (2d) 532;
Matter of Potts, 213 App. Div. 59, 63, 209 N. Y. Supp. 655.

The Third Circuit also pointed out that the District Judge stated with regard to the allegations before the Surrogate's Court:

> "The allegations contained in the objections" (of the Government in the Surrogate's Court) "and those set forth in the amended complaint" (in this case) "are unquestionably grounded on the same alleged facts and evidence" (R. 14).

The Third Circuit proceeded to state that:

> "We think the District Judge was right in the statement of fact above quoted. The objections were certainly there before the Surrogate. He set them up one by one in his elaborate order and then proceeded to disallow them" (R. 14).

The Third Circuit concluded,

> "This is not a situation where the record is devoid of information and needs outside evidence to explain what went on (before the Surrogate's Court)" (R. 15).

Summary of Argument

1. The Third Circuit was correct in holding that the Final Decree of the Surrogate's Court constitutes *res judicata* to this action.

2. The decision of the Third Circuit is not in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Rodiek* v. *Commissioner*, 33 BTA 1020, affirmed *sub. nom; Rodiek* v. *Helvering*, 87 F. 2d 329.

3. The decision of the Third Circuit conforms to the settled law of New York on the jurisdiction of the Surrogate's Court and the finality of its decrees.

4. The Third Circuit was correct in holding that under the "full faith and credit" clause of the Constitution of the United States and Section 905 (28 USC 687) of the Revised Statutes the determination of the non-existence of fraud by the Surrogate's Court was of conclusive effect.

ARGUMENT

1. The Respondent's argument in support of its claim that the Final Decree does not constitute *res judicata* in respect of the issue of the truth of the allegations of fraud overlooks entirely the facts set forth in this brief under the heading "Statement of the Case."

Objection III filed by the Government in the Surrogate's Court in opposition to the application of the Respondent for an allowance of fees for his services to the Hackfeld Estate explicitly charges the Respondent with participation in the filing and prosecution of the alleged false and fraudu-

lent claim against the Government for the return of Hackfeld's property in 1923 and 1924, and with participation in alleged bribery. Objection III not only sought to prevent the payment of further fees to the Respondent, but requested that the Respondent be surcharged to the extent of fees he had previously received. It sought an affirmative decree for the recovery of money from the Respondent on the issue of fraud and conspiracy. Section 231-a, as amended, of the Surrogate's Court Act of the State of New York expressly empowers the Surrogate "to try and determine all questions, legal or equitable, between any or all of the parties to any proceedings". Both the Government and the Respondent were parties to the Surrogate's Court proceeding and the Government raised the same issue of fraud and conspiracy therein.

In reply to a direct question of the Surrogate, counsel for the Government informed the Surrogate that the Government pressed its Objection III. Counsel for the Government never changed this position with respect to Objection III.

The record in the Surrogate's Court was replete with reference to the fraud charge. The Surrogate expressly overruled Objection III charging fraud and bribery and all objections to the payment of attorney's fees and disbursements to the Respondent, and the Surrogate overruled the request of the Government that the Respondent be surcharged to the extent of all moneys paid to him from the Estate as attorney's fees and disbursements and allowed an additional $10,000 for services. The Government requested the Surrogate to modify the Final Decree by the insertion of a statement to the effect that the charges of fraud were not determined by the Surrogate and the Surrogate refused such a modification of his decree (D. 109a-110a). The Third Circuit commented on this, that nowhere in the Record does the Government deny it (R. 13).

The "Excerpt from the Stenographer's Minutes of the New York Surrogate's Proceeding", which is set forth in Appendix A to the Petition for Rehearing filed with the Third Circuit, was not part of the Record before the District Court herein.

After the decision of the Third Circuit, the Petitioner filed a Petition for Rehearing annexing the said Appendix. This was not part of the Record before the Third Circuit on the argument of the case. The Respondent had no opportunity to object to it as the Court regarded the petition without merit and promptly denied it.

In its petition, Petitioner has sought to justify its unorthodox and unauthorized procedure by arguing that the Third Circuit sitting in Philadelphia should take judicial notice of alleged "excerpts" of alleged "minutes" of the proceedings in the Surrogate's Court of New York (R. 28-29), which so far as we know were not even filed in that Court.

The Final Decree of the Surrogate constitutes, under the law of New York, a final, conclusive and determinative adjudication of the charges of alleged false claim, fraud, misrepresentation and bribery by the defendant and is *res judicata* of the charges which are repeated in substance in the complaint in this action (see Donnelly affidavit, D. 105-106a).

The Third Circuit cited as binding decisions of this Court on *res judicata* the following:

Sealfon v. *United States*, 332 U. S. 575 (Third Circuit, opinion, p. 17, note 48);

Angel v. *Bullington*, 330 U. S. 183 (Third Circuit, opinion p. 17, note 48);

Heiser v. *Woodruff*, 327 U. S. 726 (Third Circuit, opinion p. 17, note 48);

Treiners v. *Sunshine Mining Co.*, 308 U. S. 66 (Third Circuit, opinion p. 17, note 48);
Oriel v. *Russell*, 278 U. S. 358 (Third Circuit, opinion p. 17, note 48);
Meyers v. *International Trust Co.*, 263 U. S. 64 (Third Circuit, opinion p. 17, note 48);
Burt v. *Union Central Life Insurance Co.*, 187 U. S. 362 (Third Circuit, opinion p. 17, note 48).

The language of the Third Circuit was:

> "We think, further, that the public policy of holding parties to one day in court is one which has recently found firm support and sound acceptance by the court whose authority binds us" (opinion, R. 16).

The decision of this Court in *Commissioner* v. *Sunnen*, 333 U. S. 591, cited by petitioner, is not in point. The *Sunnen* decision involved tax litigation concerning different tax years. This Court has made new rulings on applicable tax statutes between the first and second decisions of the Tax Court.

2. The Petitioner contends that the decision of the Second Circuit in *Rodiek* v. *Helvering, supra*, an estate tax case, is in conflict with the instant decision of the Third Circuit. There is no such conflict. In the later case of *United States* v. *Rodiek*, the Second Circuit expressly held the Tax Court and Second Circuit had not passed upon the question of the citizenship of Hackfeld in the tax case, whose decisions had been alleged to be *res judicata* on Hackfeld's citizenship. The Third Circuit held, in the *instant* case, that Surrogate Foley *had* passed on the identical issue raised in this case. The Second Circuit and the Third Circuit were in agreement in the two cases as to the

doctrine of law to be applied, but the difference in facts in each case led to different conclusions. Far from deciding contrary to any decision of the Second Circuit, as Petitioner alleges, the Third Circuit followed the Second Circuit in its interpretation of the power and jurisdiction of the Surrogate's Court of New York, citing *Griffith* v. *Bank of New York*, 147 F. 2d 899 (2d), cert. den. (325 U. S. 874) (R. 16).

3. The Third Circuit followed the applicable local law of New York. It made a careful examination of the New York law respecting the authority of the Surrogate's Court. It quoted the applicable statutes and cited the leading opinions of the Court of Appeals (R. 15-16).

It is manifest from the applicable sections of the Surrogate's Court Act and New York law quoted above in the Statement of the Case that the Surrogate's Court of New York had full and complete jurisdiction to try the fraud controversy between the Government and the defendant, who were before it on the judicial settlement of the executor's account and contesting that issue, and to judicially determine such issue.

Under the New York law, the charges of fraud, etc., contained in the objections were vital and, if proved, the Surrogate could have surcharged Silliman with the $60,000 the Government was seeking to recover (D. 103a). Furthermore, under the Surrogate's Court Act, Section 40 (R. 15-16), the court had jurisdiction "to try and determine all questions, legal or equitable, arising between any and all parties to any proceeding, or between any party and any other person having any claim or interest therein who voluntarily appears in such proceeding * * * in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires * * *"

The early New York cases of *Curry* v. *Cowles*, 6 Bosworth 452 (N. Y. Super. Ct. 1860) and *Smith* v. *Hoctor*, 51 Misc. 649 (App. Term 1906) cited by the Petitioner do not

deal with proceedings before the Surrogate's Court under the present Surrogate's Court Act, Section 40. The cited cases have never been cited by New York courts as establishing a rule of law. They do not touch upon the jurisdiction of the Surrogate's Court. They do not deal with a second contest of a determined issue between the same parties. In *Matter of Wellington,* 160 Misc. 383 (1936), Surrogate Foley points out the breadth of his jurisdiction and his full and complete powers with respect to attorneys practicing before his court. There can be no doubt under the New York law that the Surrogate had the power to determine the fraud issue in connection with the Petitioner's attempt to enlarge its recovery in that court by seeking to obtain a judgment of some $60,000 against Silliman for alleged fraud upon the Government, the very party allegedly damaged by the alleged fraud in both cases. Here was no incidental or collateral issue. It was an issue submitted to the Surrogate for determination by two parties who had voluntarily appeared in the accounting proceeding. It was the nub of the trial before the Surrogate, as the Third Circuit points out (R. 17).

4. The Third Circuit followed the applicable decisions of this Court in holding that the District Court must give "full faith and credit" to the decree. The Court first pointed out that this was an additional ground for its decision. It then quoted Section 80 of the Surrogate's Court Act (Surrogate's Court Act, L. 1920 Ch. 928, as amended L. 1938 Ch. 157, Section 80), as follows:

> "Every decree of the Surrogate's Court is conclusive as to all matters embraced therein against every person of whom jurisdiction was obtained. To such decree there is attached all the presumptions pertaining to a judgment rendered by a court of general jurisdiction in a common law action" (R. 18).

After quoting the section, the opinion cites numerous New York cases, all substantiating that the decree of the Surrogate's Court would have been followed in *any* court in New York as *res judicata*. The opinion concludes by saying that the "full faith and credit" clause compels the District Court to give the same effect to it as the courts of New York would, and that "This consideration ends the plaintiff's case" (R. 19).

In this, the Third Circuit was following the applicable decisions of this Court in *Riley* v. *New York Trust Co.*, 315 U. S. 343, 349. Additional cases are *Roche* v. *McDonald*, 275 U. S. 449, 451; *Christmas* v. *Russell*, 5 Wall. 290, 302 and *Fauntleroy* v. *Lum*, 210 U. S. 230, 236.

CONCLUSION

Res judicata is an essential ingredient of the judicial process. Public policy dictates that there be an end of litigation; that those who have raised a question which has, in conformity to local law, been determined adversely to them shall be bound by the result of the contest and that matters once determined shall be considered forever settled as between those parties. *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 525. See also *So. Pacific R. R. Co.* v. *U. S.*, 168 U. S. 48.

Respectfully submitted,

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